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NO. 84-798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Respondant

V.

GEORGE S. McLEAN,
Defendant, Petitioner

PETITIONER GEORGE S. McLEAN'S REPLY BRIEF

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February 26, 1985

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The Petitioner, George S. McLean, submits this brief in compliance with Rule 22.5 to address statements made and arguments raised in the Government's brief in opposition. Comments are made in the page

sequence of the Government's brief.

Page 2. Uriarte pled guilty on September 29, 1983 (Gov't Br. N.1) because Harvester declined to pay his legal and other expenses associated with opposing the Government's appeal. (The district court order dismissing the 43 counts was entered June 24, 1983; the notice of appeal was filed July 22, 1983; the Government's appeal brief was filed October 11, 1983 after exhausting all possible statutory extensions.)

Page 3. McLean did indeed argue that the Eckhardt Amendment requires that a corporate employer actually be convicted of a violation of the FCPA, but he was quoting from a published article by Richard S. Shine [1/] which stated,

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[1/] Richard S. Shine was chief of the multinational fraud branch of the Criminal Division of the Dept. of Justice from April 1977 until September 1982, and in that capacity was responsible for the enforcement of the FCPA.

> "in order to charge an employee or agent with a criminal violation of the antribribery provisions of the Act, either the issuer or domestic concern must have already been convicted or must be prosecuted simultaneously with the agent or employee." The New Review Procedure Under the Foreign Corrupt Practices Act II, Law and Business Inc., Harcourt, Brace, Jovanovich Publishers (1980) (Appendix II) pages 5,6. (Emphasis added.)

McLean considered that it was a reasonable assumption that this statement was the Justice Department's interpretation of the Eckhardt Amendment, considering Mr. Shine's responsibilities within the Department.

The Government misstates that the district court held that the conspiracy count must not be dismissed on the ground of the Eckhardt Amendment. The fact is, the district court denied this part of McLean's motion to dismiss without comment. (Pet. 18a)

Page 4. The Government does not comment on McLean's argument concerning

the jurisdictional aspects of cross-appeal presented from Wright's Federal Practice and Procedure at 415-418, but relies on an out of context misinterpretation of French v. Estelle, 696 F.2d 318 (5th Cir. 1982) while ignoring the fact that the failure of the pro se defendent in Estelle to file a formal cross-appeal did not preclude the Fifth Circuit from reviewing the defendant's Constitutional claim and this prevented a miscarriage of justice, id. at 320.

Page 5. The Government's brief describes the Petitioner, McLean, as "a non-indigent non lawyer who has persisted in representing himself." McLean has never claimed to be an indigent in the sense of a Clarence Earl Gideon whose defense costs would not have exceeded a couple of hundred dollars. Immediately after Harvester pled guilty

with McLean [2/] as its scapegoat, they withdrew their guarantee of any further legal fees, which were estimated at $200,000 based on a trial date in the summer of 1983. (The central defendants in the case, CEI and Donald Crawford, have reportedly already spent several millions of dollars in legal fees.) The Fifth Circuit determined that "Harvester would have no incentive to assist McLean in his defense; in fact, Harvester would have every incentive to shift as much culpability as possible to McLean." United States v. McLean, 738 F.2d 655 at 659. McLean has motioned for court appointed counsel, or alternately, for Harvester to be compelled to pay his legal costs and has been denied. McLean

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[2/] McLean had worked 18 years for Harvester and devoted his energies to the company's best interests.

refuses to sell his fixed assets, e.g. his home, which are jointly owned with his wife, in order to hire competent counsel and he has also refused to waive his Sixth Amendment rights to counsel and witnesses for his defense. McLean is defending himself because he has no other acceptable choice which is affordable. This apparently bothers the Government. 3/

Page 6. The legislative history of the Eckhardt Amendment illustrates the concern of Congress that an employee might be made a scapegoat and denied his Sixth Amendment rights, e.g. to counsel and witnesses to rebut his involvement. The practical effect of the $1 million fine per violation was to compel the corporation to bring in the witnesses

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3/ The trial is now delayed until April 8, 1985 due to the court congestion and an ongoing quest by the Government for Swiss evidence.

which would then be available to the employee. The Eckhardt Amendment statute 15 U.S.C. §78ff(c)(3) is the guarantee to the employee that he cannot be prosecuted without his Sixth Amendment rights intact.

There is no evidence in its June 24, 1983 Memorandum and Order that the district court looked beyond the wording of the statute in making its determination of the application of the Eckhardt Amendment.

The Fifth Circuit recognized in McLean, supra, at 659, that the Eckhardt Amendment was precisely intended to prevent McLean from being prosecuted without the availability of his employer's resources and knowledge.

Page 7. The Government's treatment of the 18 U.S.C. §371 issue is erroneous. Neither the FCPA nor the Eckhardt Amendment specifically addresses the question

of the rights and liabilities of persons who allegedly conspire to violate the FCPA. A fair construction of the FCPA and the Eckhardt Amendments compels the conclusion that Congress intended that the Government could indict Harvester on multiple counts (FCPA violations plus conspiring to violate the FCPA), but McLean should not be charged with any violations involving the FCPA unless Harvester was first charged with a substantive count of violating the FCPA.

Page 8. The Government contends that Congress would have specifically addressed the conspiracy issue if they intended a conspiracy charge to be included under the umbrella of protection of the Eckhardt Amendment.

The legislative history clearly shows that Congress intended to prevent the corporation from making an employee its scapegoat. Congress cannot be

faulted for failure to foresee that the Government would charge McLean with conspiracy in the Crawford case in support of the establishment of McLean as the scapegoat necessary under the theory of respondeat superior in the Harvester case in an obvious "end-run" maneuver intended to negate the protection of the Eckhardt Amendment. McLean, id. at 660.

There should be no need for Congress to specifically protect employees against illegal and otherwise infamous actions of the Government to circumvent the law when it is the Government's responsibility to enforce the law.

The Petitioner McLean's position in this case appears to be the same as the position of the fictional "Joe Bloke" who was the subject of comments by Congressman Eckhardt in discussing his amendment and H.R. 3815 in a hearing. Eckhardt stated:

> "Indeed the corporations [sic] interest might even be in conflict with that of the agent. The corporation might desire to have Joe Bloke found to have intentionally engaged in bribery and to have been the sole moving agent, that is, the company never agreed to it and the quicker they can convict Joe Bloke, the better off the company is. It is relieved of responsibility and it has a sacrificial lamb in Rome and everybody forgets about the activity."
> Cited in McLean, supra, at 658.

In view of the Government's failure to comply with the mandate of the Eckhardt Amendment by charging Harvester with a substantive violation of the FCPA, Count One of the Indictment against McLean should be dismissed.

RESPECTFULLY SUBMITTED THIS 26TH DAY OF FEBRUARY 1985.

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